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June 4, 1996

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: CS Docket No. 96-85: Implementation Of Cable Act Reform Provisions Of The Telecommunications Act Of 1996

Dear Mr. Caton:

Enclosed for filing with the Commission please find and original and eleven copies of Comments submitted in the above-referenced proceeding by Fleischman and Walsh, L.L.P. on behalf of the various cable television interests listed therein. In accordance with the Public Notice dated March 22, 1996, two copies have been annotated as "Extra Public Copy."

If there are any questions regarding this matter, please communicate directly with the undersigned.

Sincerely,

Seth A. Davidson

Enclosures

cc: ITS
Nancy Stevenson/FCC

40306/2

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Cable Act	)	CS Docket No. 96-85
Reform Provisions of the	)	
Telecommunications Act of 1996	)	

COMMENTS

ADELPHIA COMMUNICATIONS CORPORATION
ARIZONA CABLE TELECOMMUNICATIONS ASSOCIATION
CENTURY COMMUNICATIONS CORPORATION
CHARTER COMMUNICATIONS, INC.
INSIGHT COMMUNICATIONS CO.
STATE CABLE TV CORP.
SUBURBAN CABLE TV CO. INC.

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Dated: June 4, 1996

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SUMMARY

The purpose of this proceeding is to implement certain provisions of the Telecommunications Act of 1996 relating to the regulation of cable television. The Commission, in the course of adopting interim rules implementing the 1996 Act, already has reached tentative conclusions regarding many of the issues presented. Fleischman and Walsh, L.L.P., commenting on behalf of various cable interests, addresses these matters as follows:

- **Effective Competition.**

Comparable Programming. In determining whether a LEC-affiliated competitor is offering "comparable programming" for purposes of the 1996 Act's new effective competition standard, superstations should not be distinguished from other broadcast signals. In addition, access to a single broadcast station should be sufficient to meet the comparable programming test. And the inclusion of references to broadcast signals on an MMDS operator's marketing materials, line-up cards, etc. should be deemed evidence that the MMDS operator has taken affirmative steps sufficient to be deemed to be "offering" broadcast signals.

SMATV And MMDS Service. SMATV service is clearly distinguishable from direct-to-home satellite service, as evidenced by the language and history of the 1996 Act. Therefore, SMATV service should not be included in the definition of direct-to-home satellite service for purposes of the new effective competition standard. In the case of MMDS service, the Commission should adopt on a permanent basis the presumption that wireless cable is "offered" within an MMDS operator's protected zone.

Pass Or Penetration Standard. Unlike certain of the effective competition standards adopted by the 1992 Cable Act, the 1996 Act's new effective competition standard does not

include penetration and pass requirements. Rather, the statute only requires that the competitor's service be "offered" in the cable operator's franchise area. Based on this language, and in order to give effect to Congress' intent, the Commission should find that the presence of LEC-affiliated competition in any portion of a franchise area is sufficient to deregulate the entire franchise area.

Affiliate. For purposes of the new effective competition definition, the Commission should apply the definition of "affiliate" adopted in § 3(a)(2) of the 1996 Act. The Commission also should give effect to business realities by treating both passive and active ownership interests as attributable and by treating beneficial interests as "equivalent" to an equity interest. Such interests include non-voting stock and insulated partnership interests, as well as options, convertible debentures, interests held in trust, and even certain forms of debt. For purposes of defining the term "beneficial interest," the Commission should look to an analogous rule adopted by the Securities and Exchange Commission. And the Commission should aggregate the interests of different LECs in applying the affiliation standard. Finally, the Commission should consider modifying Form 430 to require wireless cable operators to certify that they are not LEC-affiliated and should otherwise require LEC-affiliated competitors to cooperate in the provision of ownership information to cable operators.

Procedures. In order to ensure uniform decision-making, the Commission should be the exclusive arbiter of effective competition petitions. Where opposed, such petitions should be resolved in accordance with the same expedited timetable specified in Section 76.915 of the Commission's rules; where the petitions are unopposed, or all of the relevant LFAs indicate their concurrence, the petition should be deemed to be granted immediately. And,

consistent with the policies underlying the automatic stay provision of Section 76.911 of the Commission's rules, the filing of an effective competition petition should trigger immediate conditional deregulation of the petitioning cable operator's rates, subject to refunds and rollbacks.

- **CPST Rate Complaints.**

The Commission should modify its proposed CPST complaint procedure to ensure that the resolution of such complaints is completed expeditiously and does not interfere with the Form 1240 annual rate adjustment process. Because a cable operator's liability now runs from the submission of the first subscriber complaint to the LFA (not the filing of Form 329 with the FCC), and in order to allow cable operators to evaluate and promptly respond to subscriber concerns (which may transcend CPST rates), LFAs should be required to forward copies of subscriber complaints to the cable operator within 10 days of their receipt. In addition, the LFA should have to decide whether to proceed with a formal Form 329 complaint within 30 days of receiving the cable operator's response (which can be submitted to the LFA any time within 30 days of the operator's receipt of two valid complaints). The LFA's 30 day period for considering whether to file Form 329 is not intended to be a full blown rate review proceeding. If the LFA is dissatisfied with the operator's response, the LFA has the recourse of filing a formal complaint with the FCC; therefore, the 30 day period should not be subject to extension under any circumstance.

Small Cable Operators.

Affiliation/Small System Cost-Of-Service Rules. Congress gave no indication when it adopted the 1996 Act's small cable operator provisions that the 20 percent affiliation standard applied by the Commission in its small cable system cost-of-service rules should not be

applied to the new provisions as well. Since both the existing small system rules and the new statutory provisions share the goal of minimizing regulation and ensuring access to capital for small cable entities, the use of a higher affiliation threshold is appropriate in both cases. For the same reasons, the Commission is correct in its decision to retain its existing small system rules as an adjunct to the new statutory relief provisions.

Determining Small Operator Status. To avoid the possibility of inconsistent rulings and to minimize administrative burdens, small operator deregulation certifications should be submitted directly to the Commission, not the LFA. Moreover, the applicability of the small cable operator relief provisions turns on the franchise area size, not system size, as is clear from the legislative language. Bulk rate subscribers should be counted using the EBU methodology that is commonly applied in both commercial and regulatory contexts.

Scope Of Deregulation. The Commission has correctly determined that the 1996 Act completely deregulates small cable operator who offered only a single tier on December 31, 1994, even if the operator subsequently offers more than one tier. Simply splitting an unregulated BST into multiple tiers does not constitute a "fundamental change" in service. And subsequent changes in the size of a small operator (due to subscriber and/or revenue growth or the operator's acquisition by a larger company) should not result in the reregulation of a small operator that qualified for deregulation on February 8, 1996 or thereafter.

- **Uniform Rates.**

The expanded bulk rate exception to the uniform rate requirement should apply whether or not the bulk rate is negotiated for an MDU as a whole and whether or not subscribers are billed individually. Moreover, the bulk rate exception should apply to all

facilities that do not occupy public rights-of-way. With respect to predatory pricing complaints, the Commission should adopt an objective and administratively manageable threshold showing requirement for such complaints including a requirement that the MDU in question represent a competitively significant portion of the market. The Commission also should rely on discovery procedures similar to those applied in the program access context, subject to an *in camera* review procedure to protect cable operators from having to publicly disclose sensitive cost information.

- **Technical Standards.**

The 1996 Act precludes local regulation and enforcement of technical standards. Although an LFA, as part of the franchise process, may take into account whether a cable operator has complied with the FCC's technical standards, only the FCC can make a determination regarding such compliance.

- **Subscriber Notice.**

The Commission has adopted rules implementing Section 301(g) of the 1996 Act, which (i) allows cable operators, at their "sole discretion," to use any reasonable written means to provide notice to subscribers regarding rate and service changes and (ii) provides that cable operators "shall not be required" to provide any prior notice of rate changes due to franchise fees or similar assessments. While the language of the 1996 Act is clearly preemptive, the Commission, in order to prevent unnecessary disputes, should expressly declare that more stringent non-federal notice requirements are no longer enforceable.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Cable Act	)	CS Docket No. 96-85
Reform Provisions of the	)	
Telecommunications Act of 1996	)	

COMMENTS

The law firm of Fleischman and Walsh, L.L.P. ("F&W"), on behalf of the cable operators and associations cited below,[1] hereby submits comments on the above-captioned rulemaking proceeding.[2] The Commission has instituted this proceeding for the express purpose of implementing certain provisions of the Telecommunications Act of 1996 (also referred to herein as "the 1996 Act")[3] relating to the regulation of cable television. Notice at ¶ 1.

I. EFFECTIVE COMPETITION.

Section 623(a)(2) of the Communications Act, as amended by the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 543(a)(2), generally

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[1]The cable operators and associations joining in these comments are: Adelphia Communications Corporation; Arizona Cable Telecommunications Association; Century Communications Corporation; Charter Communications, Inc.; Insight Communications Co.; State Cable TV Corp.; and Suburban Cable TV Co. Inc.

[2]In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, CS Docket No. 96-85, FCC 96-154 (rel. April 9, 1996) ("Notice").

[3]Telecommunications Act of 1996, Pub.L. No. 104-104, 100 Stat. 56, approved February 8, 1996 (hereinafter cited as "1996 Act").

provides that, where a cable system is subject to "effective competition," the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority. Congress initially established three separate measures of "effective competition:" (1) the low penetration standard; (2) the 50/15 standard; and (3) the municipally-owned competitor standard.[4]

As part of the Telecommunications Act of 1996, Congress has added a fourth standard for determining whether a cable system is subject to effective competition (and therefore exempt from rate regulation). Under this new test, a cable system is deemed to be subject to effective competition where

> a local exchange carrier ["LEC"] or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.[5]

The Commission has adopted interim rules incorporating and implementing the new statutory effective competition test. Notice at ¶¶ 5-18. The Notice seeks comment on these interim rules as well as on other issues relating to the new test. Id. at ¶¶ 69-77.

A. Definition Of "Comparable" Programming.

In order to satisfy the new effective competition standard, it must be shown that the programming offered by a LEC affiliated competitor is "comparable" to the programming

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[4]See 47 U.S.C. § 543(*l*)(1).

[5]1996 Act, Sec. 301(b)(3), to be codified at Communications Act, § 623(*l*)(1)(D).

offered by the unaffiliated cable operator.[6] For purposes of its interim rules, the Commission adopted a definition of "comparable" programming that is derived from a statement in the 1996 Act's legislative history indicating that "comparable" programming requires "access to at least twelve channels of programming, at least some of which are television broadcasting signals." Notice at ¶ 12 (emphasis added), citing S. Rep. No. 104-230, 104th Cong., 2d Sess. 170 (1996). However, the portion of the 1996 Act Conference Report cited by the Commission also contains a specific reference to 47 C.F.R. § 76.905(g), the Commission's existing definition of the term "comparable programming." Under that definition, "a competing multichannel video programming distributor must offer at least 12 channels of video programming, including at least one channel of nonbroadcast service programming."[7] While acknowledging this discrepancy, the Commission has tentatively concluded that the Conference Report's definition (i.e., some "broadcasting signals") should be adopted, notwithstanding the somewhat contradictory reference to Section 76.905(g). Notice at ¶ 69.

Assuming arguendo that the Commission's interim "comparable" programming definition accurately reflects Congressional intent, several issues remain. First, as the Commission asks in the Notice, should satellite-delivered broadcast channels ("superstations") be considered "broadcast signals" for the purpose of applying the "comparable programming standard?" Id. at ¶ 70. Superstations clearly count as "broadcast signals."[8] The legislative

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[6]1996 Act, Sec. 301(b)(3).

[7]47 C.F.R. § 76.905(g) (emphasis added).

[8]A superstation is defined as "a television broadcast station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier." 17 U.S.C. § 119(d)(9); 47 C.F.R. § 76.64(c)(2).

history of the 1996 Act does not limit the definition of "comparable" programming to local (i.e., non-superstation) broadcast stations. Furthermore, Congress has demonstrated elsewhere (e.g., the must-carry provisions of the Communications Act) that it knows how to distinguish local stations from superstations. Since Congress did not draw such a distinction in this case, it must be assumed that it intended superstations to qualify as "comparable" broadcast programming for purposes of the new effective competition test.

Second, in its interim rules, the Commission has determined that an MMDS operator will be deemed to be offering broadcast signals if the signals are available to a subscriber without an A/B switch or similar device. Id. at ¶ 14. Moreover, even where use of an A/B switch or similar device is necessary for an MMDS subscriber to receive broadcast signals, the Commission has held that a MMDS operator should be deemed to be "offering" the signals if the MMDS operator is responsible for the installation of the equipment used to receive television signals in connection with other programming provided by the MMDS operator. Id. However, according to the Commission, an MMDS operator will not be deemed to be offering broadcast signals where the requisite equipment is installed by the subscriber. Id. The latter restriction unduly narrows the concept of "offering" and creates potential for evasions (such as where the MMDS operator provides subscribers with instructions as to how to continue to receive broadcast signals and/or supplies subscribers with the requisite equipment, but leaves the actual installation to the customer or to the management of the building in which the customer resides). In order to avoid such end-runs around the statutory standard, the Commission should hold that any affirmative steps taken by an MMDS operator to assist customers in the reception of broadcast signals will meet the "offering" test. Such a ruling is consistent with the Commission's determination that

references to broadcast signals on an MMDS operator's marketing materials should be deemed evidence that the MMDS operator is offering those channels to subscribers. Channel line-up cards in particular represent the simplest and most easily obtainable evidence of an MMDS operator's (or any other competitor's) programming offerings and, therefore, should be regarded as *prima facie* evidence of those offerings.[9]

Third, neither the interim rules nor the Notice address the question of whether the "comparable programming" test requires access to more than one broadcast signal. While the Conference Report mentions "at least some . . . broadcasting signals," the Commission has previously equated the term "at least some" with "any," and "any" clearly encompasses "one."[10] Additionally, Merriam-Webster's Collegiate Dictionary defines "some" as "being one, a part, or an unspecified number of something (as a class or group) named or implied."[11] Thus, the Commission should make clear that the availability of a single broadcast signal is sufficient to satisfy the comparable programming standard.[12]

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[9]The Commission already considers cable system channel line up cards to be *prima facie* evidence of the channels carried by the system for purposes of certain Commission rules, such as the must-carry rules. See, e.g., 47 C.F.R. §§ 76.56(e), 76.302(a).

[10]Notice of Proposed Rulemaking and Notice of Inquiry, CC Docket No. 94-54, 9 FCC Rcd 5408, 5460 n.224, citing Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1411, 1436-37 (1994).

[11]Merriam-Webster's Collegiate Dictionary, Tenth Ed. (1995) at 1120 (emphasis added).

[12]Such an interpretation also is necessary to give meaning to the reference to 47 C.F.R. § 76.905(g) in the Conference Report. As indicated, although Section 76.905(g) provides that "comparable" programming requires "at least one channel of nonbroadcast service," the Commission has determined that Congress intended to shift the focus of the definition from nonbroadcast to broadcast programming. Consequently, the reference to Section 76.905(g) in the Conference Report should be read as an indication that, no matter what type of programming meets the "comparable" definition, only one channel of such programming is needed.

B. SMATV Is Not "Direct-To-Home Satellite Service."

The Notice seeks comment "as to whether the type of service provided by, or over the facilities of, the LEC or its affiliate should be relevant" to the application of the new effective competition test. Notice at ¶ 71 (footnote omitted). In particular, the Commission asks "whether satellite master antenna television ("SMATV") systems constitute direct-to-home satellite services and hence do not fall within the class of video providers that can be a source of effective competition under the new test. Id.

SMATV clearly is not "direct-to-home satellite service" within the meaning of the 1996 Act. Of particular significance in this regard is Section 602(b) of the 1996 Act, which addresses the preemption of local taxation of "direct-to-home" services. Section 602(b) specifically provides that

> [t]he term "direct-to-home satellite service" means only programming transmitted or broadcast by satellite directly to the subscribers' premises without the use of ground receiving or distribution equipment, except at the subscribers' premises or in the uplink process to the satellite.[13]

Further explaining the differences between direct-to-home and other service, the legislative history of Section 602(b) states that DTH [direct-to-home] satellite service is a "national rather than a local service . . . Unlike other video programming distribution systems, satellite-delivered programming services do not require . . . the physical facilities or services of a community."[14] In contrast, as the Commission itself has previously

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[13]47 U.S.C. § 602(b)(1). Direct-to-home satellite service is generally regarded as encompassing DBS (which operates in the 12.2 - 12.7 GHz, or "upper Ku" band), and low power DBS (both 4 and 6 GHz C band, and 11.7 - 12.2 GHz Ku band).

[14]H.R. Rep. No. 204, 104th Cong., 1st Sess. 125 (1995) ("House Report").

concluded, "the SMATV service operator functions much like a traditional cable operator,"[15] except that it "serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management" and that does not use "any public right-of-way."[16] Thus, a SMATV system, like a cable system, receives signals which are then processed, packaged, and distributed to residences within a distinct community. Because the ultimate customers of a SMATV system do not receive the signal "direct" from the satellite, as is the case with direct-to-home satellite service, the Commission should not include SMATV service in the definition of "direct-to-home satellite service."[17]

C. MMDS Service Should Be Deemed To Be "Offered" Within Its Interference-Free Contour.

The new effective competition standard adopted as part of the 1996 Act requires that a LEC affiliated competitor "offer" service in the cable operator's franchise area. Citing the Conference Report, the Commission has adopted an interim rule under which, for purposes of the new test, the term "offer" will be applied as currently defined by Section 76.905(e) of the Commission's Rules. Notice at ¶ 9.[18] Moreover, with specific reference to MMDS competition, the Commission has directed cable operators filing effective competition

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[15]Report and Order and Further Notice of Proposed Rulemaking ("Rate Order"), MM Docket No. 92-266, 8 FCC Rcd 5631, 5651 (1993).

[16]47 U.S.C. § 522(7).

[17]The Commission also has asked for comments on its tentative conclusion that the new test for effective competition applies with equal force "whether the LEC or its affiliate is merely the service provider, as opposed to the licensee or owner of the facilities." Notice at ¶ 71. F&W agrees with the Commission on this issue. There is nothing in the statute or its legislative history that would suggest that a LEC or its affiliate should be regarded as any less of a competitor when it provides service through the facilities of another rather than through its own facilities.

[18]See also Conference Report, *supra* at 170.

petitions to provide both the location of the MMDS transmitter and the protected zone, id. at ¶ 10, pointing to its previous determination that "[o]nce an MMDS operator has initiated operation, the service will be deemed 'offered' to those subscribers residing in the [35-mile] interference-free contour."[19] F&W supports the application of the interim standards on a permanent basis. The presumption that a wireless cable system is available within its 35-mile protected zone is entirely reasonable, considering that the Commission does not even accept applications for facilities in MMDS channel groups within 50 miles of another channel group station application filed before September 9, 1983.[20] Moreover, just as the Commission will consider evidence (e.g., signal strength measurements) to rebut the presumption of availability within the 35-mile zone, so too should the Commission consider similar evidence that wireless service is available beyond the 35-mile zone.

D. Congress Did Not Intend Any Pass Or Penetration Test For Effective Competition.

The Commission notes that the new effective competition test adopted as part of the 1996 Act "does not, unlike the other three effective competition tests, include a percentage pass or penetration rate." Notice at ¶ 72. Inexplicably, however, the Notice "seek[s] comment as to whether Congress intended effective competition to be found if a LEC's, or its affiliate's, service was offered to subscribers in any portion of the franchise area, or whether the competitor's service must be offered to some larger portion of the franchise area

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[19]Rate Order, 8 FCC Rcd at 5657-58 (footnote omitted). See also 47 C.F.R. § 21.902(d) (defining the interference-free contour of an MMDS facility as "a circle with a radius of 35 miles centered on the MMDS transmitter site").

[20]See Memorandum Opinion and Order (Falcon Telecable, Sinton, TX), DA 95-23, 10 FCC Rcd 1654, 1655-56 (1995). See also In Re R. Gardner Partners, File Nos. 0125-CM-P-92 et at., 10 FCC Rcd 11612 (1995).

to constitute effective competition." Id. F&W submits that both the clear language of the statute and the congressional intent underlying the new effective competition test require deregulation of the entire cable franchise area if LEC-affiliated competition is offered in any portion of the franchise.

The new effective competition test plainly requires only that the competitor's service be "offered" in the cable operator's franchise area, not that any particular level of subscribers actually accept such service.[21] Thus, the Commission has no basis for considering the competitor's "potential pass rate." Id. at ¶ 72. As Commissioner Quello stated in his Separate Statement to the Notice, the new effective competition test is "one of the more important and straightforward provisions of the 1996 Act."[22] Likewise, as Commissioner Chong stated in her Separate Statement to the Notice,

> [i]n adopting an effective competition test without a specific pass or penetration rate, Congress made its intention clear that this fourth effective competition test would be met if the LEC offered service in any portion of the franchise area. If Congress had intended a higher standard, I believe that it would have specified a pass or penetration rate as it did in the other three effective competition tests.[23]

Given the inclusion in the 1992 Cable Act of penetration and pass requirements for the other prongs of the effective competition test, it is apparent that Congress would have

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[21]1996 Act, Sec. 301(b)(3).

[22]Notice, Separate Statement of Commissioner James H. Quello. Commissioner Quello further stated that the Commission should limit its role to implementing the unambiguous words of the statute, and not read in an unintended pass or penetration requirement to the new effective competition test, "in order to end the roller coaster ride of regulation that cable operators have had to endure since passage of the 1992 Cable Act." Id.

[23]Id., Separate Statement of Commissioner Rachelle B. Chong, at 2 (emphasis in original) (footnote omitted).

included similar requirements in the new effective competition test had it so intended. Instead, Congress intended the effective competition test to reflect the fact that an affiliation with a LEC gives an MVPD advantages over an unaffiliated competitor, such that no pass or penetration rate is necessary.[24] In effect, the question of whether LEC-affiliated competition "is sufficient to have a restraining effect on cable rates" has already been addressed by Congress, and thus is not properly before the Commission here. The Commission should not permit cable's competitors an unwarranted opportunity to argue for restrictions on this unambiguous statutory test.

E. The Effective Competition Test Should Adopt The New Statutory Definition Of "Affiliate."

The new effective competition test refers to a LEC or its "affiliate." Title VI of the Communications Act contains the following definition of "affiliate":

> the term 'affiliate," when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person.[25]

However, as the Commission notes, Section 3(a)(2) of the 1996 Act establishes a new definition of "affiliate" in Title I of the Communications Act:

> [t]he term 'affiliate' means a person that (directly or indirectly) owns or controls, is owned or controlled, or is under common ownership or control with another person. For purposes of this

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[24]Congress was undoubtedly aware of the huge capital investments, widely reported in the press, being made by LECs such as Pacific Bell, NYNEX and Bell Atlantic in MMDS operators and other MVPDs. See, e.g., Rich Brown, "MMDS (Wireless Cable): A Capital Ideal," Broadcasting & Cable, May 11, 1995 at 16.

[25]Notice at ¶ 74, citing Communications Act, § 602(2).

> paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent.[26]

Under Section 3 of the Communications Act, this new definition of "affiliate" generally applies throughout the Act, "unless the context otherwise requires . . ."[27]

In the Notice, the Commission asks whether, for purposes of the effective competition test, "the context requires" a different definition of "affiliate" than that established in new Section 3(a)(2). Notice at ¶ 76. The Commission tentatively concludes that the new Title I definition should apply. Id. at ¶ 77. F&W agrees with the Commission's tentative conclusion because we do not see how "the context requires" a different definition of affiliate for purposes of the effective competition definition.

The Commission also has tentatively concluded that, in applying the new definition of "affiliate" to the effective competition test, "both passive and active ownership interests are attributable," and that beneficial interests should be deemed "equivalent" to an equity interest. Id. at ¶¶ 15, 77. F&W agrees. Not counting such interests ignores business realities and leads to absurd results. For instance, non-voting stock and insulated limited partnership interests are "passive" ownership interests whose inclusion is consistent with Congressional intent to find that effective competition is present where a LEC has made a significant financial investment in a competing MVPD. Similarly, options, warrants, convertible debentures and interests held in trust should be found to be the "equivalent" of equity in this context. Indeed, even certain forms of debt can be the "equivalent" of equity

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[26]Id. at ¶ 75, citing 1996 Act, § 3(a)(2).

[27]Communications Act, § 3.

under some circumstances. Such a reading of the statute is consistent with recent Commission cases taking a broader view of ownership and control.

For example, in its May 1995 decision finding that Twentieth Holdings Corporation's ("THC") foreign ownership exceeded the statutory ownership benchmark, the Commission counted News Corp.'s capital contribution in THC as "capital stock," and thus the equivalent of equity.[28] According to the Commission, "[t]raditionally, shareholders' ownership interests in corporations correspond to the amounts of their capital contributions."[29] Likewise, the 1996 Act mandates that "an equity interest (or the equivalent thereof)" be counted,[30] thereby expressing Congress' clear intent that "a simple 'count the shares' methodology" is insufficient to capture all arrangements whereby LEC capital infusions have fortified a competitor.[31] In counting not only equity ownership but its equivalent in the 1996 Act, Congress acted consistently with the Commission's proposals to look at "the totality of the circumstances, the economic reality and substance of the transaction, and not . . . only on the labels provided by the parties."[32]

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[28]Fox Television Stations, Inc., Memorandum Opinion and Order, File No. BRCT-940201KZ, 10 FCC Rcd 8452 (1995) at ¶ 45 (footnote omitted) ("Fox 1"). The Commission affirmed these conclusions several months later, but granted a renewal of the television broadcast station at issue, WNYW-TV, due to the "unique facts" of the case. Fox Television Stations, Inc., File No. BRCT-940201KZ, 78 RR 2d 1294 (1995) ("Fox 2").

[29]Fox 1 at ¶ 45.

[30]1996 Act, § 3(a)(2).

[31]Fox 1 at ¶ 43.

[32]Fox 2 at ¶ 16, citing Wilner & Scheiner, 103 FCC 2d 511, 519 n.38 (1985) (using "economic reality" test).

It is apparent from all of the foregoing that, based on the 1996 Act's broad "equity interest or equivalent" definition, passive and active ownership interests are attributable, and beneficial interests in a cable operator are "equivalent" to an equity interest.[33] Moreover, reading the new effective competition definition so as to ensure that passive and active ownership interests cannot escape being considered equity or its "equivalent" would maximize competition between cable operators, who would otherwise be subject to rate regulation, and LEC-affiliated competitors, who are free from rate regulation.

The Notice also asks how "beneficial interest" should be defined. Notice at ¶ 77. F&W recommends that the FCC adopt the definition of "beneficial ownership" promulgated by the Securities and Exchange Commission (the "SEC") in Rule 13d-3 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), which reads, in pertinent part:

> (a) For purposes of Sections 13(d) and 13(g) of the [Exchange] Act, a beneficial owner of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares:
>
> > (1) Voting power which includes the power to vote, or to direct the voting of, such security; and/or
> >
> > (2) Investment power which includes the power to dispose, or to direct the disposition of, such security . . .
>
> (d) Notwithstanding the provisions of [paragraph] (a) . . . of this rule:
>
> > (1)(i) A person shall be deemed to be the beneficial owner of a security . . . if that person has the right to acquire beneficial ownership of such security, as defined in Rule 13d-3(a) within

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[33]Conference Report at 174.

> 60 days, including but not limited to any right to acquire: (A) through the exercise of any option, warrant or right; (B) through the conversion of a security . . .[34]

Section 13(d) of the Exchange Act was amended by the Williams Act, which places an affirmative disclosure duty on those persons (i) beneficially owning in excess of 5 percent of a public company's equity securities (by requiring such persons to file a Schedule 13D or 13G with the SEC, the company involved and the principal exchange on which its shares are traded), or (ii) commencing a "tender offer" for in excess of 5 percent of a public company's equity securities (by requiring such persons to file a Schedule 14D with the SEC, the company involved, the principal exchange on which its shares are traded and any competing bidder(s)).[35] The Williams Act was enacted by Congress for the following principal reasons: (1) to protect investors from corporate raiders who could force shareholders into making a hasty, uninformed decision to sell their securities by offering to buy a portion of the target corporation's securities at a premium price;[36] and (2) to aid investors in their decision making and maintain informed securities markets.[37]

Thus, the SEC Rule 13d-3 affiliation test is broad in scope in order to require disclosure of significant financial investments which may take the form of beneficial interests rather than common stock. Similarly, the new effective competition test was designed to identify situations where the competitor has been fortified through financial infusions from a

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[34]17 C.F.R. § 240.13d-3.

[35]15 U.S.C. § 78(l)-(n).

[36]See Susquehanna Corp. v. Pan American Sulphur Co., 423 F.2d 1075, 1085 (5th Cir. 1970).

[37]See H.R. Rep. No. 1711, 90th Cong., 2d Sess. 2821 (1968).

LEC, even though such investments are in forms other than capital stock. Since the policy goals of the new effective competition test are complimentary with the Exchange Act's policies, it would be appropriate to adopt the Exchange Act's definition of "beneficial ownership."

As is the case with the Commission's current effective competition rules, competitors should be required to cooperate reasonably in the provision of ownership affiliation information requested by the cable operator. For example, under the current effective competition rules, "cable operators may request from a competitor information regarding the competitor's reach and number of subscribers. A competitor must respond to such request within 15 days."[38] The Commission also requires cable operators who receive inadequate signal quality from television broadcast stations seeking carriage rights to "cooperate with the television station to resolve the problem."[39] Thus, a requirement that competitors cooperate reasonably in providing ownership affiliation information requested by cable operators would be consistent with the cooperation required of cable operators and other competitors throughout the Commission's rules. In addition, the Commission should consider modifying FCC Form 430 to require wireless cable operators to certify that they are not LEC-affiliated. This simple requirement could save significant resources and administrative burdens by parties, including the Commission, who might otherwise need to investigate the operator's ownership and affiliation relationships.

Also consistent with the Commission's current effective competition rules, the interests of more than one LEC should be aggregated in applying the affiliation standard.

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[38]47 C.F.R. § 76.911(b)(2).

[39]Report and Order, MM Docket Nos. 92-259 et al., 8 FCC Rcd 2965, 2990 (1993).

The Commission currently aggregates MVPD subscribership in applying other aspects of the 1992 Cable Act's effective competition definition, and a similar approach is necessary to avoid the anomalous situation where one LEC purchases a 10.1 percent equity stake in an MMDS operator and is this considered affiliated, but six LECs could enter into a joint venture, each purchasing a 9.9 percent stake in the MMDS operator, for a total of 59.4 percent, and not be deemed affiliates of the operator.[40] Such an anomaly would ignore the "business realities" of the situation and lead to a "patently absurd" result.[41]

F. Procedures For Effective Competition Showings.

The Commission has tentatively concluded that it should make permanent certain interim procedures adopted for determining whether effective competition is present under the new statutory test. Notice at ¶ 73. Under those procedures, a cable operator may file a petition with the Commission demonstrating that the relevant statutory criteria have been met. Id. at ¶ 17. F&W strongly agrees that, in the interest of uniformity, the Commission should be responsible for deciding whether or not effective competition exists. However, certain refinements in the interim rules are necessary to minimize delay and promote regulatory certainty.

Specifically, cable operators should be conditionally relieved from BST and CPST rate regulation immediately upon the filing of an effective competition petition with the Commission, with service on the relevant local franchising authority ("LFA"). The Commission would then review the operator's petition pursuant to the timetable described

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[40]Id. at 2994.

[41]See Fox 1 at ¶ 43; BBC License Subsidiary, L.P., File Nos. BALCT-941014LH *et al.*, 10 FCC Rcd 7926, 7936 (1995) (Separate Statement of Commissioner Susan Ness).